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No. 91-1202

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; Ei Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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64

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION 1

A. AS TO MOOTNESS: MASSIVE BARRAGE OF FEDERAL JUDICIAL POWER AIMED AT EXPANDING STATE PRISON CAPACITY AT THE BACK-END OF THE TEXAS CRIMINAL JUSTICE SYSTEM WHILE HOLDING HARRIS COUNTY JAIL AT DESIGN CAPACITY IMPOSES ONGOING FINANCIAL LIABILITY FOR STATE TAXPAYERS AND ENSURES ONGOING CONTROVERSY 1

B. THE *ALBERTI* DECISION DOES CONFLICT WITH *KELLY* 4

C. THE LOWER COURT SHOULD HAVE ABSTAINED OR, ALTERNATIVELY, CERTIFIED TO THE TEXAS SUPREME COURT . . 5

D. THE DELIBERATE INDIFFERENCE ISSUE IS RIPE FOR REVIEW 7

E. PETITIONERS HAVE STANDING TO RAISE THE ISSUE OF THE *ALBERTI* COURT'S EQUATING DESIGN CAPACITY WITH CONSTITUTIONAL CAPACITY AND EXPLICITLY RAISED THE ISSUE, INCLUDING THE "WAIT AND SEE" APPROACH, IN THE COURT BELOW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Alberti v. Sheriff of Harris County v. Richards, 937 F.2d 984 (5th Cir. 1984) 5, 6, 10

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Benjamin v. Malcolm, 803 F.2d 46 (2nd Cir. 1986), *cert denied sub nom. Cuomo v. Koehler*, 480 U.S. 910 (1987) 2

Board of Education of Oklahoma City v. Dowell, 498 U.S. ___, 111 S.Ct. 630 (1991) 8

Bullock v. Calvert, 480 S.W.2d 367 (Tex. 1972) 2

Bush v. Viterna, 795 F.2d 1203 (5th Cir. 1986) 8, 9

Freeman v. Pitts, ___ U.S. ___, S.Ct. No. 89-1290 (March 31, 1992) 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7

Houston v. Hill, 482 U.S. 451 (1987) 6

Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941) 7

Kelly v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee 836 F.2d 986 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988) 4, 5, 6

Martin v. Wilks, 490 U.S. 755 (1989) 8

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, (1984) 7

Rizzo v. Goode, 423 U.S. 362 (1976) 8, 9

Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1981) 2

Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982) 9

Tarrant County Commissioners Court v. Markham, 779 S.W.2d 872 (Tex. App. - Fort Worth 1989, writ denied) 6

Tate v. Frey, 735 F.2d 986 (6th Cir. 1984) 2

Wilson v. Seiter, 501 U.S. ____, 111 S.Ct. 2321 (1991) 7

Texas Statutes

TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226, eff. August 29, 1991 ("H.B. 93") 1

TEX. GOV'T CODE, Ch. 444, Subch B (Vernon Supp. 1992) 4

TEX. GOV'T CODE § 499.125 (Vernon Supp. 1992) 1

TEX. GOV'T CODE § 511.012(b) (Vernon 1990) 8

Texas Constitution

TEX. CONST. Art. VIII, § 6 2

Texas Legislative History

S.B. 24 (introduced in the First Called Session) § 14.02, p. 34 2

Other Statues

Miss. Code § 47-5-10 (Supp. 1981) 9

Miss. Code § 47-5-112 (1) (Supp. 1981) 9

Miss. Code § 47-5-159 (Supp. 1981) 9

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

A. AS TO MOOTNESS: MASSIVE BARRAGE OF FEDERAL JUDICIAL POWER AIMED AT EXPANDING STATE PRISON CAPACITY AT THE BACK-END OF THE TEXAS CRIMINAL JUSTICE SYSTEM WHILE HOLDING HARRIS COUNTY JAIL AT DESIGN CAPACITY IMPOSES ONGOING FINANCIAL LIABILITY FOR STATE TAXPAYERS AND ENSURES ONGOING CONTROVERSY.

The Plaintiff and County Respondents (hereinafter, sometimes "the Plaintiffs" and "the County") argue in their Briefs in Opposition (hereinafter, "Briefs") that there is no longer any controversy because legislation recently passed by the Texas legislature, H.B. 93,[1] has "clarified the relation of the duties and responsibilities of the state and the counties for housing prisoners." Plaintiffs' Brief at 3-5; *see also* County Brief at 15. For several reasons, nothing could be further from the truth.

First, neither the Fifth Circuit nor the district court in this case (hereinafter the "*Alberti* court") has even heeded the explicit language of H.B. 93 and the state court settlement agreements allowing compensation for transfers to other county jails *only on or after* October 1, 1991. *See* TEX. GOV'T CODE § 499.125 (Vernon Supp. 1992) App. A 5; *see also* App. B to this Reply at 4-5 (settlement agreement in *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial District of Texas, pending)); Petition for Writ of Certiorari (hereinafter "Petition") at 10-11. Instead, State Defendants have deposited $6,750,000 into the registry of the *Alberti* court to compensate Harris County for transfers *prior* to October 1, 1991, and to date County Defendants have requested an additional $4,572,285.25 for such transfers.

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[1] TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226, eff. August 29, 1991 (hereinafter, "H.B. 93"). See pertinent excerpts in Appendix (hereinafter "App.") A to this Reply.

Moreover, compensation for transfers prior to October 1, 1991 is especially inappropriate in light of the legislative history of H.B. 93 which shows that an earlier version of that law would have allowed compensation under state law from February 7, 1991, the date of the *Alberti* court's original order. S.B. 24 (introduced in the First Called Session) § 14.02, p. 34, proposing TEX. GOV'T CODE § 499.123(b) (copies of entire bill lodged with Clerk of the Court). The deletion of that provision indicates that the Legislature's intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-617 (Tex. 1980); *see also Bullock v. Calvert*, 480 S.W.2d 367, 370-372 (Tex. 1972) (lack of appropriations evidence of legislative intent); TEX. CONST. Art. VIII, § 6 (funds may not be drawn from the State treasury without a specific appropriation therefor). Hence, the propriety of what Harris County concedes to be federally ordered compensation[2] by the State of Texas to its political subdivision or "*the district court's reimbursements made to Harris County*," County Brief at 11, still remains a live controversy with state taxpayers seeking the return of their monies improperly awarded as compensation to Harris County by the lower court.

Second, the *Alberti* court has ordered the Harris County jail capped at its design capacity (4,698 inmates) based on state statutes and a 1975 consent decree even though these standards do not, according to the *Alberti* Special Master, necessarily establish a constitutional standard. *See* trial of week of September 12, 1989, tr. vol. I, pp. 162-165; Petition at 12. Moreover, both the *Alberti* Special Master and the state's expert gave testimony which established that the Harris County jail

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[2] This is not a case at all like *Benjamin v. Malcolm*, 803 F.2d 46 (2nd Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910 (1987) or *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984) as the County Respondents suggest. *See* County Brief at 14. Both *Benjamin* and *Tate* concerned *accepting inmates into existing units operated by the state, not compensating a state's political subdivision for the acquisition of additional capacity* as is the case here. The latter situation raises profound questions under Article III, the Eleventh Amendment and principles of federalism.

could be constitutionally managed at a range of 5,500-6,000, see Petition at 12-13, and the *Alberti* court routinely set caps at 6,300. Petition at 13.

Pursuant to the *Alberti* court's ruling, Petitioners must make transfers under H.B. 93 to other counties sufficient to reduce the population in the Harris County jail to the design capacity (4,698) as opposed to a level of 6,000 which the *Alberti* Special Master and the state's expert testified should be appropriate. The difference between those two population levels is 1,302. The current cost per day of a transfer under H.B. 93 is approximately $35 per day. *See* Contracts attached to Request for Ruling on Motion for Reconsideration and Vacation of Portions of the Orders of November 25, 1991 and December 3, 1991 and Request for Expedited Consideration in *Alberti v. Klevenhagen v. Richards*, Civil Action No. 72-H-1094 (S.D. Tex. Houston Div.) (copies lodged with Clerk of the Court). Under these figures State Defendants must bear a potential aggregate cost of *$45,570 per day* in order to comply with the district court's order setting the design capacity of the Harris County jail at its constitutional capacity. This amounts to an aggregate cost of *$16,643,050 per year.*[3] Hence, the district court's determination that design capacity is equal to constitutional capacity certainly is not moot and raises the prospect of profound fiscal consequences for the state.

Third, the *Alberti* court's intrusion into the Texas criminal justice system and state budgetary and legislative process shows little sign of abating. Given the ability of front-end population pressures in Harris County to "outstrip"[4]

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[3] Even assuming that the state would have to compensate Harris County at a rate of $20 per day under H.B. 93 ($26,040 per day, $9,504,600 per year) for the 1,302 inmates that remained in the jail, the extra costs (more than $7,000,000 per year) still would be substantial. Nor is it certain that payments to Harris County will be maintained in light of state budgetary constraints.

[4] *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special

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the state's ability to add additional capacity, except for a few isolated cells in remote counties, there are no more jail cells left to transfer inmates pursuant to H.B. 93. As a result, the *Alberti* court on March 13, 1992 entered an order (App. C to this Reply) requesting jail and prison population projections for the next six months, twelve months, two years and five years and the filing of a joint remedial plan. Given its prior remedial order and the Fifth Circuit's affirmance of that order, coupled with the explosive population pressure in Harris County (number of transfer-eligible felons sentenced to state prison sometimes increasing at rate of approximately 100 per week), there can be no doubt that the *Alberti* court will order either massive acquisition of new capacity or compensation to Harris County to acquire new capacity, if not wholesale release of felons,[5] absent some limiting ruling by this Court.

B. THE *ALBERTI* DECISION DOES CONFLICT WITH *KELLY*.

Both the Plaintiffs (Brief at 5-6) and the County (Brief at 12-14) contend the Fifth Circuit successfully distinguished *Kelly v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988) from its decision in *Alberti*. They further assert -- erroneously -- that Petitioners did not address the Fifth Circuit's attempted distinction between the two cases.

The distinction the Fifth Circuit attempted to draw between *Kelly* and its own decision essentially was that in *Kelly*

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Master,") (copies lodged with the Clerk of the Court) at 24; *see also* Errata to Monitor's Review of Objections of March 11, 1992 (hereinafter "Monitor's Review") (copies lodged with the Clerk of the Court).

[5] The *Alberti* Special Master has recommended triggering the Prison Management Act (PMA), TEX. GOV'T CODE Ch. 444, Subch. B (Vernon Supp. 1992); App. A 1, to expedite the release of *felons* thereby easing population pressures in facilities housing *misdemeanants*. *See* Monitor's Review at 15, 19-20.

the state had not been adjudicated a *current* constitutional violator, whereas in *Alberti*, the State Defendants (Petitioners) had been. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984, 1001 (5th Cir. 1991) (Petition at App. A 34-35). Petitioners did address this distinction at 14-15 and 17 of the Petition, arguing that the distinction begged the central and critical question decided in *Kelly* -- whether federal courts should inject themselves into internal *state-law* disputes between state governmental entities and adjudicate such issues as their division of financial responsibilities. *Kelly*'s core holding was that federal courts should refrain from deciding such disputes.[6] Petition at 15-17. Petitioners in this case were held "constitutional violators" only because the Fifth Circuit ignored *Kelly*'s core holding and proceeded to adjudicate a dispute concerning "*hard questions*" of "*exclusively*" state law, *Alberti*, 937 F.2d at 994 (Petition at App. A 18), between Petitioners and the County over which State agency had legal responsibility for the inmates in question. The Fifth Circuit thus failed to harmonize its decision to adjudicate the "*exclusively*" state-law dispute between state officials and the County[7] with the chief ground for decision in *Kelly* -- that federal courts should not even reach such controversies.

C. THE LOWER COURT SHOULD HAVE ABSTAINED OR, ALTERNATIVELY, CERTIFIED TO THE TEXAS SUPREME COURT.

It is almost impossible to overstate how weak the Respondents' arguments are in regards to abstention or, alternatively, certification. Plaintiffs did not even address these issues,

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[6] This is expecially so when neither the County nor Plaintiffs have argued that Petitioners' financial assistance was necessary to secure Plaintiffs' federally protected rights. Petition at 17-18.

[7] While the Plaintiffs did sue Petitioners, they did so only after the second trial on liability and at the suggestion of the *Alberti* court. Transcript, Trial of September 12-15, 1989, vol. 1, pp. 5-11, vol. 4(A), p. 83. Moreover, Plaintiffs recognized that state, not federal, court was the appropriate forum for the county to seek reimbursement. *See* Request for Emergency Order of October 28, 1990 at 4-5 (Copies lodged with Clerk of the Court).

a response which has the benefit of candor since in the Fifth Circuit they explicitly acknowledged the law was unsettled and moved the court for certification. See App. D to this Reply.

On the other hand, the County, without citation to precedent, advances the position that to impose a remedy against one defendant without determining the liability of all is "contrary to established principles of jurisprudence." County Brief at 17. Yet this is exactly what the Sixth Circuit has suggested must be done (at least as to third-party defendants) when it held that the "'constitutional wrongdoers must pay for their wrongs' argument has little or no force when we are talking about two political entities, a state and one of its subdivisions", and the legislature has chosen not to shift "to the state as a whole the costs of repairing the wrongs within each subdivision." *Kelly*, 836 F.2d at 998; Petition at 15-16. And the Sixth Circuit's reasoning applies *a fortiori* here, where "[t]he county clearly has some responsibility for the conditions in its own jails," but where Petitioners' liability rested on "*hard questions*" of "*exclusively*" state law. *Alberti*, 937 F.2d at 994 (Petition at App. A 18). Under the Eleventh Amendment, especially when state law is unclear,[8] "it is difficult to think of a greater intru-

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[8] The County Respondents continue to rely on a single state district court's letters, findings and judgments as clearly establishing the state law in this case. *See* County Brief at App. A-H. However, they neglect to note that the judgments underlying both state court cases have been vacated, App. E and F to this Reply, pursuant to settlement (App. B). Accordingly, the material in these appendices are of no legal effect.

The County Respondents' reliance on *Houston v. Hill*, 482 U.S. 451 (1987), Brief at 15 n.36, is misplaced. In *Hill* the municipal courts had for 30 years "regularly applied" and construed "an unambiguous statute" that facially violated the First Amendment. *Hill*. at 470. Here, there are unsettled issues of state law involving recently enacted statutes which implicate critical issues of statewide concern. In such circumstances, federal courts should await a truly authoritative ruling from Texas' highest court.

Nor can *Tarrant County Commissioners Court v. Markham*, 779 S.W.2d 872, 874-75 (Tex. App. - Fort Worth 1989, writ denied), County's Brief at 9 n.21, be considered authoritative. The observations the County quotes were gratuitous *dicta* made when Petitioners were not parties to the case and had no opportunity to present their side of the story.

sion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984).[9] Certainly, at the very lest, the Fifth Circuit should have certifed to the Texas Supreme Court. Petition at 23.

D. THE DELIBERATE INDIFFERENCE ISSUE IS RIPE FOR REVIEW.

Neither the County nor Plaintiffs have objected to Petitioners' Motion to Defer Proceedings on Petition for Writ of Certiorari Pending Decision in *Alberti v. Klevenhagen*, Fifth Cir. Nos. 91-2946, 91-6062, 92-6206. Oral argument for these appeals has been set the week of July 6, 1992, App. G to this Reply, and the Fifth Circuit has expedited the proceeding. App. H to this Reply. Accordingly, this Court may simply defer proceedings on this petition and await further rulings in the Fifth Circuit.

However, this issue is ripe for review now inasmuch as the Fifth Circuit should have concluded that Petitioners were not deliberately indifferent *as a matter of law*, without the necessity of any remand for fact-finding. In light of the uncertainty in state law, state officials cannot be held deliberately indifferent *as a matter of law*, because their duties under state law were not "clearly established" or readily "apparent." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton* 483 U.S. 635, 640 (1987); *see also Wilson v. Seiter* 501 U.S. __, 111 S.Ct. at 2323, 2326-27 (relying on individual liability cases in formulating "deliberate indifference" standard).[10] In this re-

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[9] Given *Pennhurst*, the County cannot reasonably stand on *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941) or other circuit authority cited in their Brief at 16 n.40. Such diversity cases, involving private parties, do not raise Eleventh Amendment concerns.

[10] The County also argues that State Defendants should have moved to modify *Ruiz*. County Brief at 21. Petitioners have already addressed that issue. Petition at 25. Certainly whether modification would have been granted is not clearly established. Moreover, Petitioners moved on

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gard, it is clear in the Fifth Circuit that, in the absence of *clearly established* direct supervisory responsibility over local jails, even a State-law duty to inspect the jails coupled with an obligation to promulgate standards for them is insufficient to confer a duty on a State agency (the Texas Commission on Jail Standards) to remedy unconstitutional conditions found in them. *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986); *see also Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976). This is so despite the fact that the Jail Standards Commission had the power under Texas law to transfer inmates from a jail that is not "safe and suitable." TEX. GOV'T CODE § 511.012(b) (Vernon 1990). Here, in contrast, State Defendants had no state law means to inspect local jails (let alone a duty to do so) and no duty to promulgate standards.[11] In light of *Bush*, it simply was not clearly

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January 29, 1991 to terminate jurisdiction in *Ruiz* pursuant to *Board of Education of Oklahoma City v. Dowell*, 498 U.S. ___, 111 S.Ct. 630 (1991). *See also Freeman v. Pitts*, ___ U.S. ___, S.Ct. No. 89-1290 (March 31, 1992). A hearing on that motion is set for July 6, 1992.

[11] If Petitioners had owed some clearly defined duty to remedy unconstitutional conditions in the local jail, it might be argued that the November 8, 1988 order, alluded to by County Respondents (Brief at 20), constituted notice and placed an obligation on Petitioners to inspect the jail. Here, however, Petitioners had no duty under Texas law to inspect the jail, nor even the means to conduct an inspection, let alone a clear duty to remedy the conditions there. At the time of the November 1988 order, none of State Defendants' agents had a right even to enter the jail. Indeed, this is true even to this day at least as to inspecting the jail.

Furthermore, Petitioners were not a party to this suit in November of 1988, and, accordingly, the *Alberti* court's order of that date did not bind them to any legal or factual assertion it made. *Martin v. Wilks*, 490 U.S. 755, esp. at 763 (1989). Indeed, Petitioners still maintain that both the legal and factual assertions contained in that order are clearly wrong. (For example, at the time of that order, which alleged overcrowded conditions in the jail, the jail's population was reportedly approaching 6,000 [5,650 in July 1988, according to the November 8, 1988 order]. However, both the *Alberti* Special Master and the state's expert testified that the jail can be constitutionally managed at this population level. See Petition at 12-13; *see also* Petition at 27-29. And the *Alberti* court routinely capped the jail at 6,300. Petition at 13.)

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established that a State agency (such as TDCJ) with no state law authority to supervise local jails would be liable for remedying unconstitutional conditions in one. Indeed, such a contention would have had (and has) at least the appearance of anomaly.[12] This is especially the case when, in contrast to the Texas Commission on Jail Standards, TDCJ had no statutory involvement in transferring inmates to other county jails prior to H.B. 93.

E. PETITIONERS HAVE STANDING TO RAISE THE ISSUE OF THE *ALBERTI* COURT'S EQUATING DESIGN CAPACITY WITH CONSTITUTIONAL CAPACITY AND EXPLICITLY RAISED THE ISSUE, INCLUDING THE "WAIT AND SEE" APPROACH, IN THE COURT BELOW.

County Respondents claim, *without citation*, that Petitioners lack standing to challenge the cap on the jail. County Brief in Opposition at 21. Petitioners have, however, already shown their standing in their Petition at 27 n.28.

Both the County (Brief at 22) and Plaintiffs (Brief at 7-10) claim that Petitioner did not raise the "wait and see" challenge to caps in the Court below. The record, however, shows this assertion to be flatly wrong. See Brief of State Appellants in Fifth Circuit at 85-87 (App. I to this Reply, the entire section of Petitioners' brief to the Fifth Circuit relating to the con-

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Moreover, knowledge of the assertions in court orders or parties' pleadings, cannot serve as a surrogate for *actual knowledge* of the conditions of confinement and a clear state law duty to remedy those conditions arising from direct supervisory control over the jail. *See Rizzo v. Goode*, 423 U.S. at 375-76; *Bush v. Viterna*, *supra*.

[12] Moreover, *Bush*, decided after *Pennhurst* and dealing with Texas State structures, is far more persuasive authority than *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982). The Mississippi officials said to be responsible in *Stewart* for convicted felons in local jails did have a degree of supervisory authority over those jails. *See e.g.* Miss. Code §§ 47-5-112(1), 47-5-10, 47-5-159 (Supp. 1981).

stitutional capacity of the jail, esp. at App I 2). Moreover, the County also briefed thoroughly the equation of constitutional capacity with design capacity. App. J attached hereto. In short, two parties aligned on this issue raised and thoroughly briefed it for review by the Fifth Circuit, which decided it. *Alberti*, 937 F.2d at 1000-1001 (Petition at App. A 33). There can be no question, then, that the issue is properly before this Court.

CONCLUSION[13]

For these reasons, Petitioners request that the Court grant them the relief sought in their Petition for a Writ of Certiorari and for such other relief as this Court may deem just, fair and equitable.

Respectfully submitted,

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[13] Petitioners are disturbed by County Respondents' attempts to portray Petitioners as misrepresenting the facts or law in this case. Deviations from the County's positions are not misrepresentations. Suffice it to say that Petitioners disagree with the County's characterizations.

APPENDIX A

PERTINENT STATUTORY CHANGES ENACTED BY H. B. 93

TEXAS GOVERNMENT CODE CHAPTER 499

SUBCHAPTER B. POPULATION MANAGEMENT

§ 499.025. Award of Administrative Good Conduct Time; Advancement of Parole Eligibility Date.[1]

* * * *

(b) * * * * If the Commission on Jail Standards determines that in any county jail in this state there exists an inmate awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required for transfer have been completed for not less than 45 days, the board[2] may direct the Board of Pardons and Paroles to proceed in the manner described by Subsection (c).

(c) If the Board of Pardons and Paroles receives a directive from the board under Subsection (b), the Board of Pardons and Paroles, acting in parole panels, shall immediately begin to review and consider for early release to intensive supervision parole each eligible inmate who would not at the time of review otherwise be eligible for parole. The board may impose additional criteria for determining which inmates are eligible for release under this subsection. A parole panel may not release an inmate under this subsection if the panel determines that the release of the inmate will increase the likelihood of harm to the public, according to objective parole criteria.

[1 The language set forth here under Subsection (b) is entirely new language enacted by H.B. 93. A version of Subsection (c) existed in previous law but was amended by H.B. 93.]

[2 The "board" refers to the Texas Board of Criminal Justice.]

* * * *

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG[3]

§ 499.121. Legislative Declaration; Mandamus

(a) The legislature declares that until September 1, 1995, the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under Section 499.071.[4]

(b) The legislature declares that until September 1, 1995, a county shall continue to perform its duty to confine and maintain under suitable conditions and at the county's own expense each inmate eligible for transfer from the county to the institutional division, until the date the inmate is actually accepted into custody by the institutional division. This subsection does not take effect if the County of Nueces et al. v. Texas Board of Corrections, et al., in the 250th Judicial District Court of Travis County, Texas, Cause No. 452,071 and Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 are settled by written agreement on or before the 31st day after the effective date of this article.

(c) The legislature declares that on and after September 1, 1995, the institutional division has a duty to accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the institutional division.

[3 All the provisions set forth below were newly enacted by H.B. 93.]

[4 This refers to Section 499.071 of the Texas Government Code, which is set forth in App. Z to the Petition.]

(d) The duties provided by this subchapter may be enforced by an action in mandamus.

§ 499.122. Inmate Count

The Commission on Jail Standards shall analyze monthly the population of each jail in this state that is the jail for a qualifying county and determine the number of inmates confined in the jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed. The commission may not consider in determinng the population of the jail under this section any inmate who is in the jail after having been transferred from another jail and for whom the commission has made payment under this subchapter.

§ 499.123. Payment

(a) Not later than the 32nd day after the effective date of this subchapter, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on April 1, 1991, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed on that date.

(b) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (a) at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates in jails that are the jails for qualifying counties under

Subsection (a) confined by qualifying counties. The commission shall make the payment under this subsection on or before January 15, 1992.

(c) Not later than September 10, 1993, the Commission on Jail Standards shall determine for each in this state that is the jail for a qualifying county the number of inmates confined in the jail on September 1, 1993, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed, as determined under Section 499.122, on that date.

(d) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (c) at an amount per inmate to be determined by dividing the total number of inmates in county jails that are the jails for qualifying counties under Subsection (c) confined by qualifying counties into $11.5 million. The commission shall make the payment under this subsection or or before January 15, 1994.

§ 499.124. Emergency Overcrowding Relief

(a) From the effective date of this subchapter until August 31, 1993, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail

Standards shall pay to a qualifying county for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

(b) From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

§ 499.125. Transfer of Felony Backlog

(a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of inmates in the jail, the commission shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

(b) The Commission on Jail Standards is liable to counties for payment of the costs of transportation for and maintenance of transferred inmates. Costs paid to a county shall be paid into the treasury of the county operating the facility receiving the inmates. The costs for maintenance of an inmate for which the commission is liable under this section are:

> (1) the actual costs, as determined by the agreement between the board and the officer or governing body authorized by law to enter into contracts, but only if Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 is settled by written agreement on or before the 31st day after the effective date of this subchapter; or
>
> (2) if the suit described by Subdivision (1) of this subsection is not settled within the period specified by the subdivision, for each inmate for each day the first $20 of actual costs and one-half of costs that are in excess of $20, with the transferring county liable to the operators of the receiving facility for all costs are [sic] not paid by the state.

(c) If the board determines that a county is not reasonably utilizing its available certified jail beds, the payments authorized by this section shall be withheld to the extent necessary to equal the cost of the unutilized beds.

§ 499.126. Definition

(a) In this subchapter, "qualifying county" means a county that:

(1) on or after the effective date of this subchapter does not initiate or become a party to a suit against the state or a

state agency or state official, the subject of which is the reimbursement of the county for the confinement of inmates in the county jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision; and

(2) if, before the effective date of this subchapter, it was a party to a suit in state court described by Subdivision (1), has before the 31st day after the effective date of this subchapter:

(A) had the county's suit vacated and dismissed by the court;

(B) had the county's suit abated by the court, by entry of an abatement order that specifically provides that:

(i) the suit may not be reactivated except before September 1, 1997, and except on a finding by the court that the state has substantially failed to perform a duty imposed under this subchapter;

(ii) the county is barred from any claim for reimbursement for the cost of confining inmates on and after the effective date of this subchapter and until September 1, 1995, other than reimbursement specified in this subchapter; and

(iii) if the suit is not reactivated before September 1, 1997, the court shall vacate and dismiss the suit on that date; or

(C) had the county's suit settled by written agreement.

(b) For the purposes of this section, a court retains jurisdiction over a case in which the court has entered an abatement order during the period in which the case is abated.

APPENDIX B

SETTLEMENT AGREEMENT IN HARRIS COUNTY, ET AL. V. THE STATE OF THE STATE OF TEXAS, ET AL., NO. 475,468 IN THE 126TH DISTRICT OF TRAVIS COUNTY, TEXAS

AGREEMENT

WHEREAS, overcrowding in the Institutional Division of the Texas Department of Criminal Justice, and its predecessor, the Texas Department of Corrections (hereinafter collectively referred to as the "Institutional Division") has contributed to the cost to the Plaintiff/Relator Harris County and the Intervenor Montgomery County (hereinafter sometimes referred to as the "Counties") of confining persons who have received a judgment and sentence ordering confinement in the Texas Department of Criminal Justice following conviction of a felony, revocation of probation, parole, or release on mandatory supervision for whom paperwork and processing required for transfer has been completed (hereinafter "state-sentenced inmates") prior to their transfer to the Institutional Division; and

WHEREAS, in the future Harris County and Montgomery County are likely to continue incurring the cost of confining state sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, House Bill 93 of the Seventy-Second Legislature in the Second Called Session (hereinafter "H.B. 93") has been offered as a mechanism whereby the reformation of the criminal justice system can begin to take place while, in the meantime, providing partial compensation to Harris County and Montgomery County for confining state-sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, the parties desire to settle and compromise the judgment obtained by Harris County and Montgomery

County against the Respondents in Harris County v. State of Texas, et al, cause number 475,468 in the 126th Judicial District Court of Travis County, Texas (hereinafter the "suit"); and

WHEREAS, the parties desire to reach an agreement in the suit which would be enforceable in the courts, but would not, unfairly, limit the ability of the State of Texas to operate and/or reform the criminal justice system;

NOW, THEREFORE, in order to induce Harris County and Montgomery County to settle and compromise the judgment obtained by Harris County and Montgomery County in the suit, the Respondents hereby agree to:

1. Not later than the 32nd day after the effective date of Article 11 of H.B. 93 or the signing of this Agreement, whichever is later, the Texas Commission on Jail Standards (hereinafter the "TCJS") shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jail and confined in another county jail at a cost to the County on April 1, 1991, who were awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under Section 499.123 of the Government Code, as amended by H.B. 93, at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123 (b) of the Government Code, as amended by H.B. 93.

In the event Harris County or Montgomery County has not made a record of the date the transfer paperwork required by Article 42.09 of the Code of Criminal Procedure was completed, they may use the date the judgment and sentence

was signed by a Judge. However, for purposes of payment under other provisions of the Agreement, Harris County and Montgomery County agree and are required to maintain a permanent record of the date the paperwork provided for by Article 42.09 of the Code of Criminal Procedure was completed and the inmate became eligible for transfer to the Institutional Division.

The TCJS shall make the payment under this subsection on or before January 15, 1992.

2. Not later than September 10, 1993, the TCJS shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jails on September 1, 1993, who were awaiting transfer to the Institutional Division following conviction of a felony, or revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under this section at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(d) of the Government Code, as amended by H.B. 93.

The TCJS shall make the payment under this subsection on or before January 15, 1994.

3. From the effective date of H.B. 93 until August 31, 1993, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as

amended by H.B. 93, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmates in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

4. From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B. 93, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

5. If a state or federal court determines that conditions in the Harris County or Montgomery County jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the Institutional Division is 20 percent or more of the total number of inmates in the jail, the TCJS shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring Harris County or Montgomery County into compliance with court orders or to

reduce the percentage of inmates in the jail awaiting transfer to the Institutional Division to less than 20 percent of the total number of inmates in the jail. The TCJS is liable to the Counties for payment of the costs of transportation for and maintenance of transferred inmates. The costs for maintenance of an inmate for which the TCJS is liable under this section are the actual costs, as determined by the agreement between the Texas Board of Criminal Justice (hereinafter the "TBCJ") and the officer or governing body authorized by law to enter into contracts. No payments will be withheld unless the TBCJ determines that Harris County or Montgomery County is not reasonably utilizing its available certified jail beds, and then only to the extent necessary to equal the cost of unutilized beds.

6. Payments made to Harris County and Montgomery County pursuant to the provision of paragraphs one and three shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1992-93 legislative biennium.

7. Payments made to Harris County or Montgomery County pursuant to the provision of paragraphs two and four shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1994-95 legislative biennium.

8. Nothing in this Agreement shall be construed to limit the Legislature's ability or responsibility to appropriate additional amounts for purposes of payments provided for in H.B. 93 or to limit the Counties' ability to enforce the provisions of H.B. 93 in a proceeding outside this suit.

9. Respondents agree to begin planning and construction of thirteen thousand three hundred (13,300) additional prison beds in the legislative biennium of 1992-93 with funds appropriated for that purpose by the Legislature. Respondents further agree (i) to begin construction of an additional twelve thousand (12,000) drug treatment beds in the 1992-93 biennium or (ii) to

begin construction of at least an additional three thousand (3,000) drug treatment beds in the 1992-1993 legislative biennium and to begin construction of at least nine thousand (9,000) additional prison beds in the TDCJ system during the 1994-1995 legislative biennium. This obligation will be in addition to the obligation of the Respondents to complete construction and begin operation, in the legislative biennium of 1992-93, of the fifteen thousand (15,000) prison beds, for which funds have already been appropriated or obtained. The obligation to begin planning and constructing of the additional twenty-five thousand three hundred (25,300) prison and/or drug treatment beds during the 1992-93 biennium is contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session. However, no other provisions of this agreement, including, but not limited to, the provisions in paragraph 11, shall be contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session.

10. Respondents and the Counties agree that both parties have important roles and responsibilities in the efficient operation of the criminal justice system. Respondents acknowledge that the Institutional Division has the responsibility to accept state-sentenced inmates within a reasonable time once their paperwork and processing required for transfer has been completed. This Agreement reflects an effort by both Respondents and the Counties to provide a framework within which the backlog of state-sentenced inmates in county jails can be cooperatively and successfully addressed over the term of this Agreement. Respondents and the Counties agree that it is their mutual objective to achieve a criminal justice system in which state sentenced inmates are admitted to the Institutional Division within a period less than 45 days after they are ready for transfer. In furtherance of that objective, this Agreement shall terminate prior to September 1, 1999, if Respondents accept state-sentenced inmates, on an average over one year, not later than the 15th day after the date on which all processing required for transfer has been completed. Respondents and the Counties agree that nothing in this

Agreement shall be construed as an acknowledgement, admission or acceptance by the Respondents of an obligation, duty or requirement to accept sooner than the 45th day after the date on which all processing required for transfer has been completed for an inmate confined in a county jail while under an order of commitment to the Institutional Division and that this paragraph is not intended to be an admission of liability in this suit, or in any other suit, and shall be of no effect in any further legal proceedings between Respondents and the Counties, or any other entity.

11. Respondents agree that on and after September 1, 1995, the Institutional Division will accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

12. Nothing in this Agreement shall be construed as an acknowledgement, admission, or acceptance by Harris County or Montgomery County of the reasonableness of a 45 day period prior to transfer of state-sentenced inmates to the Institutional Division. Nothing in this Agreement shall be construed as an acknowledgement, admission or acceptance by Harris County or Montgomery County of the reasonableness or constitutionality of the policy or practice of limiting the number of state-sentenced inmates being transferred to the Institutional Division to the number prescribed by the allocation formula.

13. Nothing in this Agreement shall be construed so as to require or obligate Respondents to increase the operational capacity of the Institutional Division as provided in paragraph 9 if Respondents can demonstrate that it is not necessary to increase operational capacity in order to, after September 1, 1995, accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

14. The parties agree to execute the Agreed Motion to Vacate Judgment, Agreed Order Vacating Judgment, and Judgment attached hereto as Exhibits A, B, and C.

15. The parties agree to file the Agreed Motion to Vacate Judgment and Agreed Order Vacating Judgment attached as Exhibits A and B in the 126th Judicial District Court of Travis County, Texas.

The parties agree that the 126th Judicial District Court of Travis County, Texas, (hereinafter the "trial court") in this matter shall have continuing jurisdiction to determine whether the parties have complied with the provisions of this settlement Agreement.

In the event of the Respondents' nonperformance, Harris County and/or Montgomery County may move for reinstatement of the vacated judgment. If the trial court determines that the Respondents have violated the terms of this Agreement, the judgment will be reinstated and judgment will be entered for Harris County and/or Montgomery County. The amount due under the judgment will include the amounts due Harris County and/or Montgomery County as of April 30, 1991, as stated in the judgment, and the amounts due the Counties for confining state-sentenced inmates between May 1, 1991, and the date the judgment is reinstated, plus interest at the rate of ten percent (10%). The formula provided in the judgment for determining the amount of compensation due the Counties will be used in determining the amount due for the period from April 30, 1991, until the date the judgment is reinstated. Respondents will be entitled to an offset against the judgment amount for the amounts paid under this Agreement prior to the reinstatement of the judgment. The Respondents reserve their right to appeal the judgment if it is reinstated.

16. The parties agree that if the trial court determines that the Respondents have violated the terms of this Agreement, and the trial court determines that it is unable to reinstate the judg-

ment as provided for in paragraph 15, the parties agree that the new Judgment, attached hereto as Exhibit C, will be presented to the trial court for entry. Respondents will be entitled to an offset against the Judgment for the amounts paid under this Agreement prior to the entry of the Judgment. The Respondents reserve their right to appeal the Judgment after it is entered.

17. If the vacated judgment is reinstated or the new Judgment is entered, Respondent's obligations pursuant to this Agreement are terminated.

18. It is agreed that the penalty for non compliance with the Agreement by Respondents is reinstatement of the judgment rather than specific performance of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 of this Agreement or contempt sanctions. It is agreed that paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of the Agreement may be enforced by an action for specific performance.

19. It is agreed that the signing of this Agreement constitutes a written agreement that settles the suit as required by Sections 499.121 and 499.126 of the Government Code, as amended by H.B. 93.

20. It is agreed that this Agreement is contingent on the Court of Appeals remanding the suit to the trial court for further proceedings, if necessary, and the trial court entering the Agreed Order Vacating Judgment attached hereto as Exhibit B.

21. This Agreement shall terminate September 1, 1999, unless a motion to reinstate the judgment has been filed or the judgment has been reinstated pursuant to the provisions in paragraph 15 above or the Judgment has been entered pursuant to the provisions in paragraph 16, in which case it terminates on reinstatement of the vacated judgment or entry of the new Judgment. It is further agreed by all parties herein that upon termination of the Agreement, other than by reinstatement of the vacated judgment or entry of the new judgment, Harris

County and Montgomery County will file a motion to dismiss with prejudice in the trial court.

22. The negotiation of the terms of this document shall not be admissible as evidence to prove intent of the parties or for any other purpose in any proceeding. This shall include but not be limited to previous drafts of this agreement, letters between the parties, oral statements by the parties in the negotiation of this document or any other communication between the parties.

The attorneys of record for the parties have hereunto signed their names with full power to bind their respective clients to this Agreement.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, *et al.*	§	
V.	§	C.A. No. 72-H-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS, *et al.*,	§	

ORDER

The Court having reviewed the Monitor's report filed December 13, 1991, the objections to that report, and the Monitor's review of those objections, it is hereby

ORDERED

as follows:

(1) The parties shall file with the Court on or before May 29, 1992 a *joint* population projection for the Harris County Jail facilities and for the Texas Department of Criminal Justice covering the following time periods: the next six months, twelve months, two years and five years; and

(2) The parties shall file with the Court or or before May 29, 1992 a *joint* proposed remedial plan addressing the overcrowding problem in the Harris County Jail facilities; and

(3) The issue of the constitutional capacity of the 701 Building is REFERRED to the Monitor for an evidentiary hearing and for findings and a recommendation to be submitted to the Court on or before May 29, 1992.

Because of the gravity of the overcrowding problem in Harris County and the rapid rate at which it is currently escalating, the Court finds that prompt attention is necessary and that the County and State defendants should give this matter immediate priority. Consequently, the Court will not entertain motions from the parties to extend the deadlines set forth in this order.

SIGNED at Houston, Texas, this 12th day of March, 1992.

/s/
Chief Judge James DeAnda
United States District Judge

APPENDIX D

EXCERPTS FROM PLAINTIFFS'-APPELLEES' BRIEF (pp. 65-72) IN *ALBERTI, ET AL. v. THE SHERIFF OF HARRIS COUNTY, ET AL., v. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.*, FIFTH CIR. NOS. 91-2274, 91-2210, 90-6034, 90-2441

h. Certification To Texas Supreme Court

If Judge Hart's rulings are not entitled to preclusive effect until they are set aside on appeal, then the proper procedure for this court to follow to respect the state's interest in obtaining state court resolution of state law issues while vindicating plaintiffs' constitutional rights and the authority of federal courts to redress constitutional deprivations, would be for this court to certify to the Texas Supreme Court any unresolved questions of Texas law. Plaintiffs further submit that the court should certify certain state law questions to the Texas Supreme Court for the additional reason that, as a practical matter, no final resolution of this protracted litigation can ultimately be achieved until those issues are decided by the Texas courts. Certification presents the greatest promise for the quickest definitive resolution of these issues, thereby speeding considerably the day on which this tortuous litigation can finally come to an end.

At this point, three things are indisputably clear: (1) the Harris County jails are massively, unconstitutionally overcrowded; (2) there are sufficient cells available in other county jails throughout the state to alleviate the problem (at least for the time being); and (3) the only question is whether, and to what extent, state officials should be required to participate in paying for that temporary remedy (utilization of vacant cells in other counties) or otherwise assisting in the abatement of ongoing constitutional violations in the jails.

This case has been pending for over eighteen years. Yet, nobody disputes the fact that the mandates of the consent decree entered more than sixteen years ago still have not been achieved. Neither have the requirements of the supplemental orders entered by the district court in accordance with the reserved powers retained in the consent decree. Most importantly, no one denies that the Harris County detention facilities are currently grossly unconstitutional as a result of severe overcrowding. The only real issue at this point is whether, and to what extent, state officials have a duty to participate in eliminating these undeniably unconstitutional conditions.

While it is clear the county defendants have an obligation to eradicate unconstitutional conditions in the Harris County jails, it is less certain how much responsibility the state defendants bear, under state law, to participate in rectification of the problem by either removing state-ready inmates promptly from Harris County jails or paying the county for the cost of housing excess populations elsewhere.

Once a constitutional violation has been shown to exist, as it has in this case, the court must look to state law to determine which governmental officials are responsible for remedying the deficiency. *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986); In Re Clements, 881 F.2d 145, 154-155 (5th Cir. 1989). It is common ground in this case (and indeed, indisputable) that the county defendants have affirmative obligations under (a) the consent decree, (b) the constitution, and (c) state law, TEX. LOCAL GOV'T. CODE §§ 351.001 and 351.041; In re Clements, 881 F.2d at 154; *Bush v. Viterna*, 795 F.2d at 1206, to provide and pay for constitutional jails for all persons confined in their facilities until they are transferred to the custody of the state defendants. The unresolved question here is whether, and to what extent, state officials also bear responsibility for rectifying unconstitutional conditions in illegally overcrowded county jails housing state-ready prisoners by promptly removing from such facilities inmates who have been sentenced to serve time in the custody of the Texas Department

of Criminal Justice - Institutional Division and are ready for transfer to state custody (or paying for the housing of such inmates elsewhere).

The reason there is uncertainty about this issue is that the Texas courts have not yet finally ruled on the meaning or scope of the Comprehensive Criminal Justice Reform Act passed by the legislature in 1989, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. ch. 785, pp. 3470-3558 (H.B.No.2335) in this context. Prior to September 1, 1989 (the effective date of H.B.2335), Texas law had traditionally recognized a rather bright line dichotomy concerning the responsibilities of county and state officials for the housing of felony offenders: before conviction, such prisoners were the responsibility of county officials (the sheriff and the commissioners court); upon being sentenced to serve penitentiary time, the inmates were to be "speedily" transferred to the Texas Department of Corrections, TEX. REV. CIV. STAT. ANN. art 6166r (Vernon 1970) and became the responsibility of the state. Thus, prior to enactment of H.B. 2335, state law effectively vested exclusive responsibility for the constitutional housing of convicted felons in state officials.

In 1989, the Texas legislature fundamentally revised the relationship between the state and the counties with regard to the housing of convicted felons. While the TDCJ-ID[46] still has "primary" responsibility for the housing of convicted felons, TEX. REV. CIV. STAT. ANN. art 44113(401) § 1.02(a)(1) (Vernon Supp. 1991), there appears to have been a significant change in the extent of the state's duty to house such inmates. In the first place, the requirement that convicted felons be transferred to the TDCJ-ID "speedily" has been deleted from state law. More importantly, an elaborate mechanism, grounded in a complex formula, has been established to "allocate" among all the counties of Texas the finite number of prisoner spaces available within the TDCJ-ID. TEX. REV. CIV. STAT. ANN.

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46 That is the new name for what used to be called the Texas Department of Corrrections (TDC).

art 6166a-4 (Vernon 1991). Each county is permitted to send to the TDCJ-ID a certain number of inmates each week, and that number is determined by a detailed formula devised by the legislature and implemented by the county defendants (the members of the Texas Board of Criminal Justice).

Recognizing that the number of admissions "allocated" to the counties would invariably be less than the numbers of persons historical sentenced to TDC, the legislature created a spectrum of intermediate sanctions[47] which the district courts could utilize in lieu of TDCJ-ID incarceration, and the state provided substantial funds to the counties to finance, at the local level, those alternatives to institutionalization in the penitentiary.[48]

Thus, on the face of it, Texas appears to have decided in 1989 to limit state responsibility for accepting sentenced inmates from the counties to the numbers derived from the allocation formula, to provide funds to the counties to pay for alternative intermediate sanctions, and to require the counties to bear the financial burden of housing any more prisoners in their facilities, including so-called state-ready inmates, themselves.

Not surprisingly, the counties balked at the state's apparent effort to shift a portion of the traditional burden of paying for the housing of state-ready inmates to the local governments. Two lawsuits were filed in state district court in Travis County asserting, in essence, that the state still has responsibility to remove state-ready prisoners promptly from the county jails, or to pay the counties the cost of incarcerating them in local facilities pending transfer to the TDCJ-ID, even

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[47] Boot camps, super-intensive probation, residential probation centers, and electronically monitored home detention are examples of the kinds of intermediate, non-penitentiary punishments specifically sanctioned by the legislature.

[48] The statewide budget for funding H.B. 2335 programs from September 1, 1990 through August 31, 1991, was $50 million. Harris County's share of that fund was approximately $10 million.

after enactment of H.E. 2335. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.). In both of those cases, state district court Judge Joseph Hart ruled in favor of the counties and concluded that the state officials continue to have a duty, under Texas law, even after passage of H.B. 2235, to take all convicted felons from the counties promptly or pay for the cost of housing state-ready inmates in local facilities.[49] In essence, the state defendants must either "take or pay" according to Judge Hart.

Ever since enactment of H.B. 2335, uncertainty concerning its meaning and the extent to which it relieved state officials of responsibility for state-ready prisoners, have prevented comprehensive resolution of the Alberti case. Everybody acknowledges that Harris County detention facilities are unconstitutional due to massive overcrowding. The state defendants claim, however, that the sole responsibility to cure those deficiencies rest wholly with county officials (as a result of enactment of H.B. 2335), while the county defendants unswervingly insist that since the current overcrowding is in large part the result of the state defendants' failure promptly to remove state-ready prisoners from the local jails, the state should effect the remedy, notwithstanding passage of H.B. 2335.[50]

This routine has gone on for more than a year and a half now. At every opportunity, the state defendants cite the passage

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[49] The Nueces County case is winding its way through the state appellate system. The state's opening brief was filed on March 29, 1991; the appellees' brief will be due on April 29, 1991, if no extension of time is requested or granted. In the Harris County case, Judge Hart granted summary judgment in favor of the county as to liability. Since the parties have been unable to agree to the per diem costs of incarcerating prisioners in Harris County, trial on that "damages" issue has been set for May 13, 1991.

[50] The county defendants argue that, other than providing a few extra dollars for some locally based programs, H.B. 2335 really did not effectuate a significant change in prior law concerning the state's traditional responsibility with regard to state-ready prisoners.

from *Bush v. Viterna*, 795 F.2d at 1209, to the effect that the state has "virtually complete freedom to decide who will be responsible" for discharging constitutional obligations, and claim that the legislature, in enacting H.B. 2335, did just that and opted to delegate to the counties exclusive responsibility for the housing of state-reeady inmates in constitutional facilities (at least until there is room in the ID to accept them into state custody), and assert that, therefore, they have been relieved, by state law, from any duty to participate in effectuating a remedy for the admittedly unconstitutional conditions in the Harris County jails. Invariably, the county defendants respond that the state officials misapprehend the real meaning and import of H.B. 2335 and that state officials are still primarily obligated, under Texas law, to remove state-ready inmates promptly from the Harris County jails, at least where leaving the prisoners in that terribly overcrowded facility subjects them to unconstitutional privations and violates rights secured by the eighth and fourteenth amendments to the constitution of the United States.

Meanwhile, plaintiffs languish in horrible conditions which no one suggests comport with constitutional standards and no one denies pose serious threats to the health, safety, welfare, and, indeed, lives of the inmates condemned to be warehoused there, as well as the public at large.

It is apparent that no real, final comprehensive remedy will be achieved in this case until the Texas courts sort out the uncertainties existing in Texas law and determine definitively, and decisively, the scope of the state officials' responsibility, under Texas law, to remove state-ready prisoners from unconstitutional county jails. Until that state law determination is made, this litigation is, effectively, on a tread mill and no permanent solution to this protracted case and the seemingly never-ending problems of overcrowding in the Harris County jails can realistically be effected.

Accordingly, plaintiffs propose that this court certify to the Texas Supreme Court, under TEX. R. APP. P. 144 and TEX. CONST. 145 V § 3-c, the following questions:

a. Does Texas law impose on state (as opposed to county) officials a duty promptly to remove from unconstitutionally overcrowded county jails prisoners who have been convicted of felony offenses and sentenced to serve time in the custody of the Texas Department of Criminal Justice-Institutional Division in excess of the numbers of inmates required to be accepted into the TDCJ-ID weekly pursuant to the allocation formula promulgated pursuant to TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991)?

b. Assuming that the answer to the foregoing question is yes, does Texas law require or authorize funds from the state treasury to be utilized to pay the cost of housing excess state-ready prisoners in available cells in county jails, where state officials have declined (or are unable) to receive such inmates into the TDCJ-ID as a result of that facility being populated to the maximum extent allowed by law?

Those questions are decidedly ones which should be addressed by the Texas Supreme Court in the first instance. There is obviously no clearly controlling Texas precedent (other than Judge Hart's rulings, which are on appeal or interlocutory), and the matters are truly issues of first impression in this state. The principles of comity and federalism counsel in favor of permitting the courts of the state of Texas the opportunity to answer these crucial issues of state law, instead of the federal

courts trying to divine what Texas courts might ultimately do with them so long as plaintiffs' constitutional rights are not continually violated in the meantime (i.e. federally ordered relief proceeds).

If the certification process has any role in preserving the federal-state balance, certainly this case presents the ideal occasion for the federal court to seek definitive guidance from the highest court of the state on these state law questions in these areas of such great importance to the public policy and interest of the state.[51]

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51 Of course, referral of these questions to the Texas Supreme Court must not delay relief to the plaintiff class in any respect. Rather, the court should command the district court to order the defendants to take whatever steps are necessary to achieve needed reductions in county jail populations, including housing excess populations in vacant cells in other counties, even while the certification process is going on. No principle of comity or federalism, or other consideration, would permit the intolerable conditions currently existing in the Harris County jails to continue and persist while the Texas Supreme Court sorts out the unsettled qustions of Texas law concerning which level of government (state or county) should pay for the remedy.

APPENDIX E

NO. 475,468

HARRIS COUNTY, TEXAS,	§	IN THE DISTRICT
	§	COURT
Plaintiff and Relator,	§	
	§	
V.	§	
	§	
THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAMIE MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE,	§	TRAVIS COUNTY, TEXAS
	§	126TH JUDICIAL DISTRICT
Defendants and Respondents	§	

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Plaintiff/Relator, the Harris County, Texas, and the Intervenor, Montgomery County, Texas; together with the Defendants/Respondents, the State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben

Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allen B. Polunsky; as members of The Texas Board of Criminal Justice for vacation of the judgment entered by this Court on August 2, 1991. The Court, having considered the said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Defendants/Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Plaintiff/Relator and Intervenor being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit C to Attachment A, if Defendants/Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit C to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit C to Attachment A. The Court further finds that the Defendants/Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 2, 1991, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Defendants/Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Defendants/ Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry

of the new Judgment attached to the motion as Exhibit C to Attachment A.

SIGNED and ENTERED this 25th day of October, 1991.

/s/
JUDGE JOSEPH HART
126th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

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By: /s/
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Executive Assistant Attorney General

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ATTORNEYS FOR RESPONDENTS

APPENDIX F

NO. 452,071

THE COUNTY OF NUECES, TEXAS, ET AL. Relator	§	IN THE DISTRICT COURT
V.	§	
TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN R. DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,	§	TRAVIS COUNTY, TEXAS
Respondents	§	250TH JUDICIAL DISTRICT

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Relator, the County of Nueces, Texas; and the Intervenors, The County of Travis, Texas, the County of Tarrant, Texas, The County of Dallas, Texas, The County of Victoria, Texas, The County of Collin, Texas, The County of Hunt, Texas, The County of Bexar, Texas, The County of El Paso, Texas, The County of Lubbock, Texas, The County of Galveston, Texas, and The County of Hidalgo, Texas; together with the Respondents, Texas Board of Corrections, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Deralyn Davis, James Eller, Dennis R. Hendrix, Joe V. LaMantia, Jr., Robert Mann, Allan B. Polunsky, and James A. Lynaugh for vacation of the judgment entered by this Court on August 22, 1990. The Court, having considered said motion, finds that the parties have

satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Relator or, any or all of, the Intervenors being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit D to Attachment A, if Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit D to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit E to Attachment A. The Court further finds that the Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 22, 1990, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry of the new Judgment attached to the motion as Exhibit E to Attachment A.

SIGNED and ENTERED this 14th day of November, 1991.

/s/
JUDGE JOSEPH HART
250th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

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By: /s/
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First Assistant Attorney General

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Dan Morales
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ATTORNEYS FOR RESPONDENTS

APPENDIX G

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

April 7, 1992

IMPORTANT NOTICE

TO ALL COUNSEL OF RECORD

No. 91-6062 - Lawrence R. Alberti, El Al. vs.
The Sheriff of Harris County, TX, Et Al.
(Consolidated with Nos. 91-6206 & 91-2946)

Projected Week of Hearing July 6, 1992

Dear Counsel:

This letter will serve as advance notice that the above referenced case will be assigned for oral argument sometime during the week shown above, on a yet undetermined date.

We are giving this much advance notice to avoid conflicts. If you should have a serious and otherwise irresolvable conflict, please contact the undersigned **IMMEDIATELY**. Please do not seek reassignment unless your problem is acute and cannot be handled in any other manner.

GERALYN A. MAHER
Calendar Clerk

(504) 589-6071
FTS 682-6071

/gam

Messrs. Robert Ozer and
John B. Worley
Ms. Lisa S. Rice and
Mr. Harold M. Streicher
Mr. James Oitzinger
Mr. Gerald M. Birnberg

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6062
(D.C. #CA-H-72-1094)

LAWRENCE R. ALBERTI, ET AL.
Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.
Defendants-Third Party Plaintiffs-
Appellees-Cross Appellants,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,
Third Party Defendants-Appellants-
Cross Appellees

* *

No. 91-6206

LAWRENCE R. ALBERTI,
Plaintiff,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.
Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,
Defendants-Third Party Defendants-
Appellants.

* *

No. 91-2946

LAWRENCE R. ALBERTI, ET AL.

Plaintiff

versus

THE SHERIFF OF HARRIS COUNTY, ET AL.

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF THE STATE OF TEXAS, ET AL.,

Defendants-Third Party
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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O R D E R:

IT IS ORDERED that the motion of Governor Ann Richards, Et Al., to consolidate the referenced appeals is GRANTED.

IT IS FURTHER ORDERED that the motion of Governor Ann Richards, Et Al., to Expedite the referenced appeals is GRANTED.

/S/
PATRICK HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX I

EXCERPTS FROM STATE APPELLANTS' BRIEF (pp. 85-87) IN ALBERTI, ET AL. V. THE SHERIFF OF HARRIS COUNTY, ET AL. V. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL., FIFTH CIRCUIT NOS. 91-2274, 91-2210, 90-6034, 90-2441

A. The Alberti Court Erred in Finding that the Design Capacity of the Jail is the Constitutional Capacity,[73] and the Lower Courts Erred in Excluding Evidence on the Constitutional Capacity of the Harris County Jail.

The Alberti court's Finding of Fact 28 states that the design capacity of the jail (which has one prisoner per cell) is also its constitutional capacity. Joint Appendix, No. 27 at 26. The finding rests on the "poor physical design" of the jail and the lack of a "second means of egress." Id. There was no testimony to show that adding a second means of egress would be impossible. The "poor physical design" apparently refers to the inability of the guards to see into all cells at all times. But there was no testimony to show that the ability to see into all cells at all times was necessary for the prisoners' safety and well-being given proper classification and segregation. There was no testimony, in particular, to show that prisoners' safety would be compromised if properly classified non-violent offenders were double-celled and the jail adequately staffed and regularly patrolled.

State Defendants' criminal justice expert Steve Martin gave testimony to show that constitutional capacity and design capacity are not the same at the first trial. See trial of the week of August 15, 1989, tr. vol. 3 pp. 511-516. At the trial of August 14-15, 1990, after his third tour of the jail, Mr. Martin testified that the jail might be made constitutional, with the proper

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[73] State Defendants will not brief this point extensively, since they understand that the County Defendants intend to brief it as well.

classification and management practices, at a population of 5,800. See tr. vol. 1, pp. 128-144, esp. 143-144.

At the trial of February 27, 1990, however, the Alberti and Ruiz courts, sitting together, excluded testimony from Mr. Martin that would have shown that some double-celling could be used in the jail. They made this ruling on the grounds that double-celling was not part of State Defendants' remedial plan. See trial of February 27, 1990, tr. vol. 1(A), pp. 89-95; also, State Defendants' Offer of Proof filed March 2, 1990. But it would not have been appropriate for State Defendants to have included double-celling in their remedial plan, since that concerned the internal management of the jail. State Defendants remedial plan properly addressed what they could do to relieve the overcrowding. The courts should not have expected State Defendants to have included recommendations on the internal management of the jail in their plan.

In addition, the question of the constitutional capacity of a detention facility in an institutional reform case, which is imprecise, fluid and subject to changing circumstances, is one that a court should be willing to re-visit when new and relevant information is available. See Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982) ("wait and see" approach taken on constitutional necessity for single-celling). Indeed, as in Ruiz, a "wait and see" approach would be appropriate here. See also Rhodes v. Chapman, 452 U.S. 337, 348-50 (1981). The lower courts therefore erred in excluding this evidence and in adhering to design capacity as the constitutional capacity without waiting to see the effect of reductions in population.

APPENDIX J

EXCERPTS FROM COUNTY APPELANTS' BRIEF (pp. 49-56) IN ALBERTI, ET AL. V. THE SHERIFF OF HARRIS COUNTY, ET AL. V. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL., FIFTH CIRCUIT NOS. 91-2274, 91-2210, 90-6034, 90-2441

ISSUE V

THE ALBERTI COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CONSTITUTIONAL CAPACITY OF THE HARRIS COUNTY JAIL FACILITIES IS THE SAME AS THE DESIGN CAPACITY OF THE HARRIS COUNTY JAIL FACILITIES, AND UPON DE NOVO REVIEW, SUCH APPLICATION CONSTITUTES REVERSIBLE ERROR. MOREOVER, THE ALBERTI COURT'S SUBSIDIARY AND ULTIMATE FINDINGS OF FACT RELATING TO ITS DETERMINATION OF THE CONSTITUTIONAL CAPACITY ARE SUPPORTED BY INSUFFICIENT EVIDENCE, ARE CONTRADICTED BY LATER REMEDIAL ORDERS IN THIS CASE, AND MUST BE REVERSED. ALTERNATIVELY, THE ALBERTI COURT'S SUBSIDIARY AND ULTIMATE FINDINGS OF FACT RELATING TO ITS DETERMINATION OF THE CONSTITUTIONAL CAPACITY IN THE HARRIS COUNTY JAIL FACILITIES ARE CONCLUSORY AND INADEQUATE TO GIVE THE PARTIES AND THIS COURT A CLEAR UNDERSTANDING OF THE PROCESS BY WHICH THE ALBERTI COURT'S ULTIMATE CONCLUSIONS WERE REACHED, AND MUST BE REVERSED.

County Defendants contest the Alberti court's subsidiary and ultimate findings of fact, mixed findings of fact and conclusions of law, and application of law to the determination of the constitutional capacity of the Harris County Jail facilities.

County Defendants further dispute the Alberti Court's denial of their October 11, 1989 motion to amend the Alberti Court's September 25, 1989 Findings of Fact and Conclusions of Law as to this issue.[158]

The Alberti Court's September 25, 1989 Findings of Fact establish a per se, Constitutional threshold not supported in law, or by the record and the Alberti/Ruiz Court's later remedial orders. These findings provide, in pertinent part, that:

> 28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ration [sic] could adequately safeguard no more than the number of inmates the facilities were designed to house.[159]

The Alberti Court's Conclusions of Law, however, do not specifically address its equation of design and Constitutional capacities.

The "Constitutional" capacity of a jail must be determined by looking at the totality of the conditions in the jail, not simply by referral to design capacity. In determining whether conditions in the Jail facilities constitute cruel and unusual punishment prohibited by the Eighth Amendment, the Court "need not separately weight each of the challenged

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158 App. 54-#1090; App. 25.

159 App. 27-26.

practices and conditions, [but] instead must look to the totality of the conditions.'"[160]

The Alberti Court erred in equating design capacity with the Constitutional capacity in the Harris County Jail facilities. In Miller v. Carson, for example, the United States District Court for the Middle District of Florida ordered that the officials house no more than the design capacity of Jacksonville, Florida jail.[161] This Court, in a November, 1977 appeal, observed that "'designed capacity'" is a 'tool', not the sine qua non, for determining constitutional capacity.[162]

That same year, in Williams v. Edwards, the United States District Court for the Middle District of Louisiana enjoined the Governor of Louisiana, the Warden of Louisiana State Prison, the Director of the Louisiana Department of Corrections and others from accepting any new prisoners other than escapees and parole revokees into Angola until such time as the Angola inmate population "is no greater than design capacity."[163] In 1977, this Court affirmed the "temporary, emergency" order prohibiting new additions to the inmate population at Angola. According to this Court:

> The functions and characteristics of each building should be taken into account in arriving at the capacity of each. A simple mathematical calculation of total square feet of space divided

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160 Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986), quoting Ruiz v. Estelle, 679 F.2df 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1985); Jones v. Diamond, 636 F.2d 1364, 1368 (5th Cir.), cert dism'd sub nom, Ledbetter v. Jones, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981) (Fourteenth Amendment); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978) (Eighth Amendment).

161 Miller v. Carson, 563 F.2d 741 (1977).

162 Miller, 563 F.2d at 752, n. 18.

163 Williams, 547 F.2d at 1208.

> by a standard of square feet per man may not necessarily be appropriate or practicable.[164]

That same year, this Court determined Newman v. Alabama, rejecting the application of design capacity as the only factor in calculating per se constitutional limitations on capacity in Alabama prisons:

> Unless intended to apply only to existing facilities we do not discern the constitutional basis for the requirement that Alabama State prisoners shall be housed in individual cells, nor can we agree that "design" standards, without more, amount to a per se constitutional limitation on the number of prisoners which may be housed in a particular prison facility. Those who design prisons are not vested with either the duty or the power to prescribe constitutional standards to prison space.

Although this Court allowed the district court to limit capacity in existing prisons to design capacity, it remanded for recalculation capacity limitations in future construction in accordance with its decision in Williams v. Edwards.[165]

In United States ex. rel. Wolfish v. United States ("Wolfish"), the United States District Court for the Southern District of New York made capacity determinations relating to the dormitory unit at the New York City Correctional Center, which, although designed to house 60 inmates, actually held

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164 Williams, 547 F.2d at 1215.

165 Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977), judgment rev'd in part sub nom on other grounds, Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Edf.2d 1114 (1978), citing, Williams, 547 F.2d at 1215.

120 inmates, or 200 percent of its "rated" capacity.[166] After considering two factors, including design capacity and the "fundamental denia[l] of decency, privacy, personal security, and, simply, civilized humanity . . ." associated with double celling, the district court capped the permissible prisoner population at rated capacity.[167]

Although it approved the district court's privacy considerations, the Second Circuit found that the trial court's refusal to consider whether "any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" was unwarranted. That appellate court remanded the case to the trial court for reconsideration of the lower court's determination of constitutional capacity, emphasizing:

> There is no constitutional magic to the term "rated capacity." Indeed, "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space.[168]

The Supreme Court, on review, disagreed with the district court's and Second Circuit's privacy analysis and concluded that the Second Circuit had applied the wrong standard of review.[169] According to the Court, there is no "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment.[170]

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166 United States ex rel. Wolfish v. United States, 428 F. Supp. 333, 136 (S.D.N.Y. 1977), aff'd in part, rev'd in part, Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), judgment rev'd, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

167 Wolfish, 428 F. Supp. at 339.

168 Wolfish v. Levi, 573 F.2d 118, 128 (2d Cir. 1978), judgment rev'd on other grounds, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (finding that Second Circuit used wrong standard of review), quoting, Neman, 559 F.2d at 288.

169 Bell v. Wolfish, 441 U.S. 520, 531-32, 535, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

170 Bell v. Wolfish, 441 U.S. 520, 541-42, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In Rhodes v. Chapman, the United States District Court for the Southern District of Texas found that double bunking two prisoners in one cell at the Southern Oil Correctional Facility constituted cruel and unusual punishment. In making this constitutional capacity-ready determination, the district court reasoned that: (1) the prisoners were serving long terms of punishment, which "could only accent[uate] the problems of close confinement and overcrowding; (2) that SOCF housed 38% more inmates at the time of trial than its "design capacity"; (3) that contemporary standards of decency reflected in several studies recommended that each prison in an institution have at least 50-55 square feet of living quarters (double celled prisoners shared 63 square feet); (4) that a double-celled prisoner at SOCF would spend most of his time in the cell with his cellmate; and (5) that SOCF has made double celling a practice, rather than a temporary condition.[171]

On appeal, the Sixth Circuit affirmed the district court's order, holding that its findings were not clearly erroneous, that its legal conclusions were permissible from the findings and that its remedy reasonably responded to the violations.[172] The Supreme Court, however, reversed,[173] finding that the five conditions articulated by the district court fell short in themselves of proving cruel and unusual punishment:

> The five considerations on which the District Court relied are insufficient to support its constitutional conclusion . . . These general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or

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171 Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 2397-98 L.Ed.2d 59 (1981).

172 Rhodes, 101 S.Ct. at 2398, citing Chapman v. Rhodes, 624 F.2d 1099 (6th Cir. 1980).

173 Rhodes, 101 S.Ct. at 2398.

> wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.[174]

The Court a deemphasized the fact that SOCF was at 138% of "design" capacity at time of trial, observing that "[t]he question before us is not whether the designer of SOCF guessed incorrectly about future prison population, but whether the actual conditions of confinement at SOCF are cruel and unusual.[175] Here, as in the above-referenced cases, a per se Constitutional capacity tied to design capacity fails.

Both the Alberti/Ruiz Court's September 7, 1990 joint remedial order and the Alberti Court's February 7, 1991 remedial order contradict this determination of Constitutional capacity. The remedial orders cap the jail population at 6100 and 6300, respectively. As the Alberti Court observed in its February 7, 1991 remedial order, "[i]n hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities can be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000."[176] Given the Court's own willingness to forego this "design" capacity tied cap, this cap should be reversed.

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174 Rhodes, 101 S.Ct. at 2400.

175 Rhodes, 101 S.Ct. at 2401.

176 App. 5-5 & App. 15-3. See Aug. 14, 1990 TR. at 144 11. 2-5 ("... I am confident in predicting that the 5800 number doesn't, per se, constitute an unconstitutional overcrowding in the Harris County Jails.") (testimony of Steve Martin). See also Aug. 14, 1990 TR. VOL. I at 28, 11. 19-25, at 129, 11. 1-3 (doesn't believe 5,865 population in Harris County Jail facilities is inherently unconstitutional) (testimony of Steve Martin); (Aug. 15, 1990 TR. VOL. II at 14, 11. 8-25, at 15, 11. 5-15 (believes that prisoner population constitutional somewhere between 5,500 and 6,000) (testimony of Michael Keating, Alberti Court's Special Master).